

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

April 21, 1992

UNITED STATES OF AMERICA,)	
Complainant)	
)	8 U.S.C. 1324a Proceeding
v.)	
)	OCAHO Case No. 91100114
TUTTLE'S DESIGN BUILD, INC.,)	
Respondent)	

ORDER DENYING RESPONDENT'S MOTION TO COMPEL DISCOVERY

On March 9, 1992, respondent filed a Motion to Compel Discovery, in which it requested that the undersigned compel complainant to answer certain interrogatories and to produce certain documents, for use in respondent's defense of the proposed civil money penalty assessments herein.

The specific discovery requests of respondent in dispute consist of interrogatories numbered 3 and 4 and requests for production of documents numbered 3 and 4, which request that complainant provide the names and addresses of any business entities in Florida to which warning citations were issued by INS concerning violations of 8 U.S.C. §1324a, prior to the issuance of a notice of intent to fine to those business entities, for the period from June 1, 1988 to the present.

As grounds for that request, respondent's information is necessary in order to mitigate the civil monetary penalties against respondent for the previous use and/or continuing to employ and pay

On February 19, 1992, some 12 days after receiving respondent's discovery requests, complainant complied by providing partial responses to respondent's discovery requests, but objected, on the grounds of relevance, to those requests which sought the names and addresses of other business entities in Florida which INS has investigated and charged in connection with similar violations.

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Resultingly, respondent filed its Motion to Compel Discovery, in which it maintains that this information is necessary because the manner in which the complainant has treated other alleged violators of the same statutory provisions is directly relevant to the issue of the degree of seriousness which complainant assigns to the violations at issue. More specifically, respondent argues that the manner in which the complainant has treated other alleged violators of the same statutory provisions is relevant to that statutory factor entitled "history of previous violations" to which consideration must be given in civil money penalty assessments.

Finally, respondent contends that it does not believe that the language of the statute and the regulations limits the history of violations to those allegedly committed by the respondent herein. Instead, respondent urges, the violative history of other unrelated persons and entities should also be included. Respondent's argumentation has not, however, been accompanied by any supporting statutory, regulatory or decisional expressions.

On March 11, 1992, complainant filed a Motion for a Protective Order in which it moved for the entry of a protective order, if necessary, relating to the disclosure of information and documents requested by interrogatories 3 and 4 of respondent's interrogatories and requests 3 and 4 of respondent's requests to produce, as those discovery requests relate to persons or entities other than respondent.

In that motion, complainant objects to the disclosure of this information on the basis of relevance and contends that even should this information be found to be relevant, it should be protected from disclosure because of its confidential and privileged nature. Complainant agrees with respondent that the seriousness of a violation is one of the five factors to be considered when evaluating the appropriateness of the civil money penalties assessed. Complainant, however, contends that respondent errs in asserting that the penalties imposed against other violators are relevant to the seriousness of those violations committed by respondent in this proceeding.

Complainant also believes that respondent's argument, to the effect that the history of previous violations of other respondents is relevant, lacks merit. Complainant points out that the pertinent statutory provision at issue, 8 U.S.C. §1324a(e)(5), lists the five criteria which must be considered in assessing civil money penalties. Complainant also argues that the implementing regulations, at 8 C.F.R. §274a.10(b)(2)(v), provide that the fifth factor to be considered is "history of the previous violations of the employer.", or language which clearly limits such consideration to the employer being cited, and not to any other employer, person or entity.

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Finally, complainant argues that the applicable statutory provisions, regulations, and precedential decisions undoubtedly regard the phrase "history of previous violations of the employer" to mean the respondent being charged, and is therefore not to be extended to include unrelated third parties. For that reason, complainant maintains that any violations committed by such third parties are irrelevant to the history of those violations alleged to have been committed by the respondent in this proceeding.

For these reasons, complainant moves that the undersigned sustain its objections based on relevance, and failing in that, requests that the undersigned enter a protective order against disclosure of that information and those documents being sought in respondent's interrogatories 3 and 4 and document production requests 3 and 4.

On March 13, 1992, respondent filed a Response to the Complainant's Motion for a Protective Order, in which it asserted essentially the same arguments which it had previously asserted in its Motion to Compel Discovery.

A review of complainant's objections to respondent's discovery requests reveals that that opposition is well taken.

As noted, complainant has correctly objected on the grounds that those discovery requests involve totally irrelevant occurrences, ones not remotely associated with those events alleged in the citation at issue. The controlling procedural regulation, 28 C.F.R. §68.18(b) provides, in pertinent part, that the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved. (Emphasis Added)

And the pertinent implementing regulation, 8 C.F.R. §274a.10(b)(2)(v), provides that "...in determining the amount of the penalty, consideration shall be given to the history of previous violations of the employer." (Emphasis Added)

Several OCAHO decisions have dealt with the "seriousness of the violation" criteria in the context of assessing appropriate civil money penalty sums for related violations. In doing so, that inquiry was confined to the respondents therein, as opposed to other persons or business entities cited by INS for other similar, but unrelated, infractions. United States v. Felipe, Inc., 1 OCAHO 93, (10/11/89); aff'd by CAHO (11/29/89).

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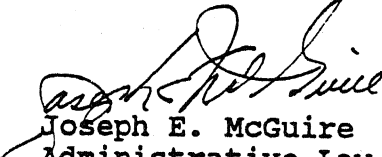
In another ruling, United States v. Jimmy Bai Huang, d/b/a Great Wall Chinese Restaurant, 1 OCAHO 300 (2/25/91), the Administrative Law Judge found that the seriousness of the violation must be evaluated on a case by case basis. For instance, paperwork violations are considered to be very serious in the IRCA framework, with the failure to present I-9's being more serious than the failure to adequately complete those forms.

In United States v. A-Plus Roofing, Inc., 1 OCAHO 209 (7/27/90), it was held that a total failure to prepare and/or present the Forms I-9 is even more serious since such conduct completely subverts the purpose of the law, and that it is appropriate to assess a greater fine for such failure.

And in United States v. Dodge Printing Centers, Inc., 1 OCAHO 125, (1/12/90), the Administrative Law Judge discussed the "seriousness of the violation" factor and explained that distinctions can readily be drawn between a failure to date a signature on an otherwise completed Form I-9 and the total failure to prepare that form.

As announced in those OCAHO decisions, the "seriousness of the violation" factor refers to the degree to which the respondent being charged has deviated from the proper Form I-9 completion format rather than, as suggested by the respondent, whether any other business entities in the neighboring communities have been cited or charged for similar violations.

For the foregoing reasons, respondents's Motion to Compel Discovery is hereby ordered to be and is denied. In view of that ruling, complainant's Motion for a Protective Order is rendered moot.


Joseph E. McGuire
Administrative Law Judge

